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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MANUEL H. LAGUNA, Plaintiff/Appellant, v. HARRY G. McFATE; DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION, Defendants/Appellees.	2 CA-CV 2009-0112 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200801605

Honorable Gilberto V. Figueroa, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 In this appeal from an administrative decision, appellant Manuel Laguna challenges the superior court's judgment affirming the decision of the Arizona Department of Transportation to suspend his driver license. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the administrative decision . . . ." *Richard E. Lambert, Ltd. v. City of Tucson Dep't of Procurement*, 223 Ariz. 184, ¶ 2, 221 P.3d 375, 377 (App. 2009). Sheriff's deputy Gagnier travelled to Laguna's home in response to a call about a "family fight." When he arrived, he found Laguna's ex-wife, G., on the front porch of the home and Laguna inside.

¶3 Gagnier spoke to Laguna, who informed him that he had "consumed a few beers" at a bar. Several witnesses at the scene informed Gagnier that, when Laguna returned home from the bar, he had driven his vehicle into the driveway and "hit the rear end of [G.]'s parked vehicle, pushing it forward." Based upon the witnesses' statements and "the way it played out . . . when [he] arrived on the scene," Gagnier concluded that Laguna had arrived home and hit G.'s car just before Gagnier's arrival.

¶4 Gagnier arrested Laguna for domestic violence. After transporting him to the police substation, Gagnier noticed "a moderate smell of an alcoholic beverage emitting from his breath as well as bloodshot and watery eyes and [that] his face was flushed." Gagnier had not seen any evidence that Laguna had been drinking at his home,

however. Gagnier also had not asked Laguna whether he had been drinking after he arrived home.

¶5 At the police station, Gagnier asked Laguna to submit to a field sobriety test, and Laguna refused. Gagnier then arrested Laguna for driving under the influence of alcohol while impaired to the slightest degree. Laguna subsequently took a breathalyzer test, which indicated more than .08 alcohol concentration in his bloodstream, so Gagnier issued Laguna an order of license suspension for ninety days pursuant to A.R.S. § 28-1385.

¶6 Laguna requested an administrative hearing pursuant to A.R.S. § 28-1321 claiming Gagnier had lacked reasonable grounds to believe he had been driving while under the influence of alcohol and, therefore, had inappropriately issued the order of suspension. At the hearing, the Administrative Law Judge (ALJ) adopted Gagnier's version of the facts and concluded that Gagnier "had more than sufficient reasonable grounds" to suspect that Laguna had been driving while under the influence of alcohol. The ALJ, therefore, affirmed the suspension of Laguna's license.

¶7 Laguna appealed the ALJ's ruling to the superior court, claiming the ALJ had erred in finding that Gagnier had reasonable grounds to believe Laguna had driven under the influence of alcohol. The superior court disagreed and affirmed the ALJ's decision. Laguna appeals from that decision.

Discussion

¶8 Laguna argues that the superior court erred in affirming the administrative decision because Gagnier could not say specifically when Laguna had driven, so there

was not substantial evidence to support the conclusion that he had driven while impaired.[1] "In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. The court must defer to the agency's factual findings and affirm them if supported by substantial evidence." *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, ¶ 11, 215 P.3d 1114, 1117 (App. 2009) (citation omitted). We undertake the same process as the superior court, reviewing de novo whether substantial evidence supports the administrative decision. *Id.* ¶ 12. Substantial evidence exists unless the administrative decision "'is without any evidence to support it, or is absolutely contrary to uncontradicted and unconflicting evidence upon which it purports to rest.'" *Lambert*, 223 Ariz. 184, ¶ 10, 221 P.3d at 378, *quoting Ariz. Dep't of Pub. Safety v. Dowd*, 117 Ariz. 423, 426, 573 P.2d 497, 500 (App. 1977).

¶9 To affirm Laguna's license suspension, the ALJ needed to determine only whether the officer had reasonable grounds to believe Laguna had been driving or was in actual physical control of a motor vehicle while impaired. *See Potter v. Ariz. Dep't of Transp.*, 204 Ariz. 73, ¶ 9, 59 P.3d 837, 840 (App. 2002). At the hearing before the ALJ, Laguna argued that the officer did not have reasonable grounds[2] to believe he had been

[1]Laguna also argues that the ALJ impermissibly considered evidence of his silence in violation of his Fifth Amendment right against self-incrimination. However, because we conclude that there was sufficient evidence for the ALJ to reach his conclusion in spite of any silence on the part of Laguna regarding his actions after he arrived home, we need not address this argument.

[2]Although Laguna characterized his argument as challenging Gagnier's "reasonable suspicion," the ALJ corrected him that reasonable suspicion was not the

driving while impaired because several hours had lapsed between his driving and the breathalyzer test. However, he makes a different argument on appeal—that the officer could not have had reasonable grounds to believe he had driven while impaired because the officer did not know when Laguna had driven. Because Laguna did not preserve this issue before the ALJ, it is waived on appeal. *See Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, ¶ 8, 985 P.2d 633, 636 (App. 1999) ("failure to raise an issue before an administrative tribunal precludes judicial review of that issue unless it is jurisdictional").

¶10 Moreover, even had Laguna preserved his argument on appeal, it is without merit. "The ALJ is the sole judge of witness credibility and resolves all conflicts in the evidence." *Paramo v. Indus. Comm'n*, 186 Ariz. 75, 79, 918 P.2d 1093, 1097 (App. 1996); *see also Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968) (ALJ may draw reasonable inferences from evidence). And "[i]f an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion." *Gaveck*, 222 Ariz. 433, ¶ 11, 215 P.3d at 1117.

¶11 Laguna admitted to Gagnier that he had been drinking earlier that evening, and Gagnier concluded that Laguna had returned home shortly before Gagnier had arrived. And upon arriving home, Laguna had driven his truck into another vehicle with enough force to move that vehicle four feet. Additionally, Gagnier did not see any

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proper term to use and Laguna responded that the "opera[tive] word" was "reasonable." Moreover, the crux of Laguna's argument challenged Gagnier's authority to suspend his license under the circumstances. We therefore presume Laguna intended to dispute whether Gagnier had "reasonable grounds" to believe he had driven while impaired.

evidence Laguna had consumed any alcohol after Laguna's arrival. The fact that Laguna provided a different explanation of the night's events at his administrative hearing did not preclude the ALJ's finding that Gagnier had reasonable grounds to believe Laguna had driven under the influence of alcohol. Furthermore, Gagnier was not required to consider Laguna's possible defenses when making his determination. *Cf. Hansen v. Garcia, Fletcher, Lund and McVean*, 148 Ariz. 205, 207, 713 P.2d 1263, 1265 (App. 1986) (affirmative defenses not to be considered in determination of probable cause); *see also Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, n.8, 54 P.3d 355, 362 n.8 (App. 2002) (assuming reasonable grounds equivalent to probable cause standard). Thus, the ALJ's decision is supported by substantial evidence in the record.

¶12 Laguna asserts that certain statements by the superior court demonstrate that the ALJ's decision was not based on substantial evidence. But because we undertake the same review process as the superior court, *Gaveck*, 222 Ariz. 433, ¶ 12, 215 P.3d at 117, any alleged inconsistencies in its statements are irrelevant to our decision.

¶13 Laguna next contends that there was not substantial evidence in his case because the evidence presented was less than that in *Smith v. Arizona Department of Transportation*, 146 Ariz. 430, 706 P.2d 756 (App. 1985). However, *Smith* does not set a standard for the minimum amount of evidence that is required; it is merely one example of a case where substantial evidence existed to support the administrative decision. In fact, *Smith* actually supports affirmance of the ALJ's decision by stating that "[i]f two inconsistent factual conclusions could be supported by the record, then there is

substantial evidence to support an administrative decision that elects either conclusion." *Id.* at 432, 706 P.2d at 758.

Conclusion

¶14 Because we conclude there is substantial evidence to support the administrative decision, we affirm the judgment of the superior court.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge